A

The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(IM)(NCvC)-1130–06 OF 2019, S-02(IM)(NCvC)-1127–06 OF 2019, S-02(IM)(NCvC)-1128–06 OF 2019, S-02(IM)(NCvC)-1129–06 OF 2019, S-02(IM)(NCvC)-1131–06 OF 2019, S-02(IM)(NCvC)-1132–06 OF 2019, S-02(IM)(NCvC)-1133–06 OF 2019, S-02(IM)(NCvC)-1139–06 OF 2019, S-02(IM)(NCvC)-1134–06 OF 2019, S-02(IM)(NCvC)-1135–06 OF 2019, S-02(IM)(NCvC)-1136–06 OF 2019, S-02(IM)(NCvC)-1137–06 OF 2019, S-02(IM)(NCvC)-1124–06 OF 2019, S-02(IM)(NCvC)-1125–06 OF 2019, S-02(IM)(NCvC)-1126–06 OF 2019, S-02(IM)(NCvC)-1168–06 OF 2019, S-02(IM)(NCvC)-1624–08 OF 2019, S-02(IM)(NCvC)-1618–08 OF 2019, S-02(IM)(NCvC)-1623–08 OF 2019 AND S-02(IM)(NCvC)-1620–08 OF 2019

C

LAU BEE LAN, ABU BAKAR JAIS AND LEE HENG CHEONG JJCA

25 MEI 2021

D

E

Civil Procedure — Injunction — Mareva injunction — Whether appellant had good arguable case — Whether respondents had assets within jurisdiction — Whether there was risk of dissipation of assets — Whether there was inordinate delay in making the application — Whether there was full and frank disclosure — Whether mareva injunction ought to be granted

F

Civil Procedure — Anton Piller order — Appeal against setting aside of ex parte order — Whether appellant had extremely strong prima facie case — Whether there was serious damage for the appellant — Whether respondents had possession of incriminating documents or materials — Whether there was a real possibility of destruction of materials — Whether Anton Piller order and order uplifting secrecy ought to be restored

G

H

Conflict of Laws — Characterisation — Revenue rule — Whether respondents were within the appellant's tax regime — Whether revenue rule applicable

I

These are the appellants appeals against the discretionary decisions of the learned judicial commissioner ('JC'), in granting various interlocutory injunctions and orders. The appellant sought to recover losses of approximately RM940m which, the appellant claimed, was caused by a fraud perpetrated by the respondents. The appellant contended that the fraud which was committed

from Labuan, Malaysia, was part of a worldwide scheme, to defraud the appellant through various entities in the UK, USA, Dubai, and Malaysia. The appellant was defrauded of approximately DKK12 billion through this worldwide scheme between 2012–2015. The appellant also contended that Malaysia was utilised because of the double taxation avoidance agreement with the Kingdom of Denmark ('the DTA'). Under the DTA, a Malaysian tax resident who owned Danish corporations' shares and earns dividends on those shares was entitled to a refund of the monies withheld by the appellant as taxes on the dividends issued on those Danish shares. These withheld taxes amounted to 27% of the total value of the dividends paid. The appellant had in the Labuan High Court ('LHC'), pleaded fraudulent misrepresentation, conspiracy to defraud, knowing receipt, and dishonest assistance against: (a) the 24 Labuan companies (the first to 24th defendants in the LHC) ('Labuan companies') which incorporations took place in short periods of time, involving many common dates of incorporation; (b) their directors and shareholders (the 25th to 60th defendants in the LHC ('directors/director respondents') and the 61st to 63rd respondents in the LHC ('shareholders/shareholder respondents')); and (c) four Labuan trust companies (the 64th to 67th defendants in the LHC) ('Labuan trust companies') which set up 24 Labuan companies on instructions from the shareholders, and whose own employees, officers and/or directors were placed in the Labuan companies as the directors. Arising from the above, the appellant had suffered losses and damage, being the sums paid out to the Labuan companies, through their agents. The appellant filed the suit in the LHC and simultaneously applied for and obtained ex parte orders for a Mareva injunction ('ex parte Mareva order') and an ex parte Anton Piller order ('ex parte AP order'). The appellant also sought an order, lifting the secrecy in the Labuan offshore jurisdiction which had denied the appellant visibility of the activities of Labuan companies and the Labuan trust companies ('order uplifting Labuan secrecy'). The respondents, on the other hand, filed applications to set aside the appellant's ex parte Mareva and AP orders, the order uplifting Labuan secrecy and also the appellant's inter partes application for a Mareva order. In the LHC, the JC made the following orders: (i) that the inter partes Mareva injunction application be dismissed; (ii) an order to set aside the Mareva order; (iii) an order to set aside the Anton Piller order; and (iv) an order to set aside the secrecy order. Aggrieved, the appellant appealed.

Held, allowing the appeals with costs:

(1) The appellant had shown that there was no credible evidence that the Labuan companies had owned and/or dealt with the purported shares in the relevant Danish corporations which were the subject matter of the appellant's claim. Further, the appellant had adduced unrebutted evidence to show that the respondents did not own shares in the relevant Danish corporations and therefore never received dividends thereon and

thus no sum had been withheld from them. If indeed, the Labuan companies owned the said shares in the relevant Danish corporations, the respondents should have produced evidence to rebut the appellant's contention and bring the whole matter to an amicable end. Additionally, the appellant had shown the inherent financial inability of the Labuan companies to own the volume of Danish shares they claimed to have owned. In the light of the forgoing, the appellant had shown a good arguable case in respect of the Mareva orders (see paras 27–29).

(2) There was clear evidence to show that the Mareva respondents were domiciled and/or had business dealings within Malaysia and were therefore likely to have assets within the jurisdiction. The Mareva respondents may have already dissipated the monies elsewhere within or outside Malaysia, making it imperative that whatever assets still within their control both within and outside Malaysia be preserved. Given the worldwide extent of the fraud as pleaded by the appellant, a Mareva injunction which was limited to the Mareva respondents' assets within Malaysia would not be sufficient to adequately safeguard the appellant against a risk of dissipation. Thus, the appellant should be granted a Mareva injunction, not limited to the assets within the Malaysian jurisdiction but a worldwide Mareva injunction against assets anywhere in the world belonging to the Mareva respondents (see paras 31–32 & 34).

(3) There was evidence that the respondents would dissipate, divert, conceal and/or mask their assets, and would destroy or hide evidence. Amongst others, the directors executed powers of attorney authorising tax agents to make the withholding tax refund claims on the basis that the Labuan companies were entitled to claim a refund of the monies withheld on dividend payments when evidence showed that they were not so entitled as there was no evidence that the Labuan companies owned shares and that none of the Labuan companies received the initial 73% of the dividend payments. Further, the appellant had shown that in cases of complex financial fraud, particularly where financial dishonesty and a lack of probity was established against the respondents, there was a serious risk that such respondents had, would and/or were likely to make themselves, shielded or protected against the claim for fraud and destroy evidence that will incriminate them in the fraud (see paras 38, 40 & 43).

(4) The fraud was allegedly perpetrated by the respondents from 2012 to 2015. The court accepted the appellant's explanation that it took the appellants three years from the discovery of the fraud to crystallise and formulate the various causes of action and file their claim, bearing in mind that the fraud involved in total, approximately USD2.1 billion, involving hundreds of individuals and entities dispersed over at least six countries, namely, the United States of America, the United Kingdom,

Luxembourg, Germany, Dubai and Malaysia. Further, the fact that there was a coordinated effort in the appellant's worldwide civil recovery is supported by contemporaneous filings of suits across the world. It is not the case that the present suit and injunctive reliefs were filed in Malaysia some years after suits were filed elsewhere. At or about the same time as when the suits were filed in Malaysia, the appellant also filed the other suits in other countries across the world. The appellant had to secure the requisite evidence, to meet the standard of a 'good arguable case' and 'an extremely strong prima facie case' before commencing its claim in LHC. There was no inordinate delay, the delay was not inordinate and likely to cause prejudice to the respondents, given the coordination required between the multiple jurisdictions (see paras 48–50 & 53).

(5) The court found that there was no reasonable basis for the JC to doubt the appellant's averments which was made by a director of the appellant who was a representative of a ministerial authority of the Kingdom of Denmark, on oath, in an affidavit that the appellant was not aware of the 2017 SØIK raid prior to applying for the ex parte orders and therefore could not have disclosed the same, which it was not aware of. The appellant, which came under the ministry of taxation, was a separate and distinct entity from the Danish state prosecutor for Serious Economic and International Crime ('SØIK') which was constituted under the ministry of justice and that the actions and/or knowledge of one department could not be imputed or equated to that, of the other. It was fair and reasonable to assume that SØIK did not and could not have disclosed the yield of the 2017 SØIK raid to the appellant, based on the pertinent legislations in the Kingdom of Denmark and in Malaysia. This included relevant provisions in the Malaysian Mutual Assistance in Criminal Matters Act 2002 which prohibited SØIK from sharing the yield of the 2017 SØIK raid with any other authority unless consent was expressly given to do so (see paras 55–56 & 70).

(6) The appellant's claim amounting to RM940m which they were defrauded of, was serious and substantial. In light of the appellant's pleaded case and the affidavit evidence, the court was of the considered view that there existed a real risk of dissipation of assets and destruction of evidence. Therefore, the ex parte Anton Pillar order would be restored (see paras 75–76 & 101).

(7) The claim filed was the appellant's attempt to seek redress and remedies under the laws recognised by Malaysia, in particular, the tort of deceit and/or fraudulent misrepresentation and not based on a debt accruing from taxes due and owing or tax evasion under the tax regime of the Kingdom of Denmark. Further, the appellant's claim in the action in LHC did not arise from the tax regime of the Kingdom of Denmark, because the respondents never owned Danish shares and were therefore

never within the Danish tax regime to begin with. The appellant's claim for the recovery of these monies/property was therefore no different from that which could be brought by any private individual or entity, being the victim of a fraud. In the light of the forgoing, the revenue rule had no application to the appellant's claim (see paras 80 & 85–86).

(8) The statutory provisions, both pursuant to s 149 of the Labuan Companies Act 1990 and s 178 of the Labuan Financial Services and Securities Act 2010, were not blanket provisions granting complete secrecy to the Labuan companies and Labuan trust companies. There were justifiable reasons to find that the secrecy afforded to both the Labuan companies and Labuan trust companies should not remain intact and should therefore be disturbed. The lifting of the secrecy would have greatly assisted the Labuan companies and Labuan trust companies if indeed they had not acted fraudulently against the appellant. In this regard, equating the considerations for uplifting Labuan secrecy similarly as considerations for refusing the inter partes Mareva and Anton Pillar orders could not be correct as the considerations for uplifting Labuan secrecy must also encompass the wider assessment whether any party would use the law to undermine the status of Labuan as a free trade zone. The appellant only needed to show on the balance of probabilities by evidence, there were reasons to grant the ex parte order uplifting Labuan secrecy. The reasons are still true and should be a basis not to set aside the order. Therefore, the order uplifting Labuan secrecy should not be disturbed and should remain in force in order to assist the High Court in determining the truth of the appellant's allegation that the Labuan companies and Labuan trust companies had acted fraudulently (see paras 90–91, 93 & 98–100).

[Bahasa Malaysia summary

Ini adalah rayuan-rayuan perayu terhadap keputusan budi bicara pesuruhjaya kehakiman yang bijaksana ('PK'), dalam memberikan pelbagai injunksi interlokutori dan perintah. Perayu memohon untuk mendapatkan semula kerugian kira-kira RM940 juta yang, didakwa perayu, disebabkan oleh penipuan yang dilakukan oleh responden. Perayu menegaskan bahawa penipuan yang dilakukan dari Labuan, Malaysia, adalah sebahagian daripada skim seluruh dunia, untuk menipu perayu melalui pelbagai entiti di UK, Amerika Syarikat, Dubai, dan Malaysia. Perayu telah ditipu kira-kira DKK12 bilion melalui skim seluruh dunia ini antara 2012 hingga 2015. Perayu juga berhujah bahawa Malaysia telah digunakan kerana perjanjian pengelakan cukai berganda dengan Kerajaan Denmark ('DTA'). Di bawah DTA, seorang pemastautin cukai Malaysia yang memiliki saham syarikat Denmark dan memperoleh dividen ke atas saham tersebut berhak mendapat bayaran balik wang yang ditahan oleh perayu sebagai cukai ke atas dividen yang dikeluarkan ke atas saham Denmark tersebut. Cukai yang ditahan ini berjumlah 27%

daripada jumlah nilai dividen yang dibayar. Perayu telah di hadapan Mahkamah Tinggi Labuan ('MTL'), mengaku salah nyata palsu, berkonspirasi untuk menipu, mengetahui penerimaan, dan memberi bantuan tidak jujur terhadap: (a) 24 syarikat Labuan (defendan pertama hingga ke-24 dalam MTL) ('syarikat Labuan') yang pemerbadanannya berlaku dalam jangka masa yang singkat, melibatkan banyak tarikh biasa pemerbadanan; (b) pengarah dan pemegang saham mereka (defendan ke-25 hingga ke-60 dalam MTL ('pengarah/responden pengarah') dan responden ke-61 hingga ke-63 dalam MTL ('pemegang saham/responden pemegang saham')); dan (c) empat syarikat amanah Labuan (defendan ke-64 hingga ke-67 dalam MTL) ('syarikat amanah Labuan') yang menubuhkan 24 syarikat Labuan atas arahan daripada pemegang saham, dan pekerja, pegawai dan/atau pengarahnya sendiri telah ditempatkan di syarikat Labuan sebagai pengarah. Berbangkit daripada perkara di atas, perayu telah mengalami kerugian dan kerosakan, iaitu jumlah yang dibayar kepada syarikat Labuan, melalui ejen mereka. Perayu memfailkan saman di MTL dan pada masa yang sama memohon dan memperoleh perintah ex parte untuk injunksi Mareva ('ex parte pesanan Mareva') dan perintah ex parte Anton Piller ('perintah ex parte AP'). Perayu juga memohon perintah, menarik balik kerahsiaan dalam bidang kuasa luar pesisir Labuan yang telah menafikan penglihatan perayu terhadap aktiviti syarikat Labuan dan syarikat amanah Labuan ('perintah membongkar kerahsiaan Labuan'). Responden pula memfailkan permohonan untuk mengetepikan perintah ex parte Mareva dan AP perayu, perintah membongkar kerahsiaan Labuan dan juga permohonan inter partes perayu untuk perintah Mareva. Di MTL, PK telah membuat perintah-perintah berikut: (i) supaya permohonan injunksi inter partes Mareva ditolak; (ii) perintah untuk mengetepikan perintah Mareva; (iii) perintah untuk mengetepikan perintah Anton Piller; dan (iv) perintah untuk mengetepikan perintah kerahsiaan itu. Oleh kerana terkilan, perayu telah merayu.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Perayu telah menunjukkan bahawa tidak ada bukti yang boleh dipercayai bahawa syarikat Labuan telah memiliki dan/atau berurusan dengan saham yang dikatakan dalam syarikat Denmark yang berkaitan yang menjadi perkara pokok tuntutan perayu. Selanjutnya, perayu telah mengemukakan keterangan yang tidak disangkal untuk menunjukkan bahawa responden tidak memiliki saham dalam syarikat Denmark yang berkaitan dan oleh itu tidak pernah menerima dividen ke atasnya dan oleh itu tiada jumlah yang telah ditahan daripada mereka. Jika benar, syarikat Labuan memiliki saham tersebut dalam syarikat Denmark yang berkaitan, responden sepatutnya mengemukakan bukti untuk menyanggah hujah perayu dan membawa keseluruhan perkara itu untuk diselesaikan dengan baik. Selain itu, perayu telah menunjukkan ketidakupayaan kewangan yang wujud dalam syarikat Labuan untuk

memiliki jumlah saham Denmark yang mereka dakwa dimiliki. Berdasarkan ini, perayu telah menunjukkan kes yang boleh dipertikaikan berkenaan dengan perintah Mareva (lihat perenggan 27–29).

(2) Terdapat leterangan untuk menunjukkan bahawa Mareva di mana responden-responden berdomisil dan/atau mempunyai urusan perniagaan dalam Malaysia dan dengan itu berkemungkinan mempunyai aset dalam bidang kuasa. Responden Mareva mungkin telah mengagihkan wang ke tempat lain di dalam atau di luar Malaysia, menjadikannya penting bahawa apa-apa aset yang masih dalam kawalan mereka di dalam dan di luar Malaysia perlu dipelihara. Memandangkan tahap penipuan di seluruh dunia seperti yang dirayu oleh perayu, injunksi Mareva yang terhad kepada aset responden Mareva di Malaysia tidak akan mencukupi untuk melindungi perayu dengan secukupnya daripada risiko pelesapan. Oleh itu, perayu harus diberikan injunksi Mareva, tidak terhad kepada aset dalam bidang kuasa Malaysia tetapi injunksi Mareva di seluruh dunia terhadap aset di mana-mana di dunia kepunyaan responden Mareva (lihat perenggan 31–32 & 34).

(3) Terdapat keterangan bahawa responden akan melesapkan, mengalihkan, menyembunyikan dan/atau menutup aset mereka, dan akan memusnahkan atau menyembunyikan bukti. Antara lain, para pengarah melaksanakan kuasa wakil yang memberi kuasa kepada ejen cukai untuk membuat tuntutan bayaran balik cukai pegangan atas dasar bahawa syarikat Labuan berhak menuntut pemulangan wang yang ditahan atas pembayaran dividen apabila bukti menunjukkan bahawa mereka tidak berhak seperti yang terdapat di sana, tiada bukti bahawa syarikat Labuan memiliki saham dan tiada satu pun syarikat Labuan menerima 73% pembayaran dividen awal. Selanjutnya, perayu telah menunjukkan bahawa dalam kes penipuan kewangan yang kompleks, terutamanya di mana ketidakjujuran kewangan dan kekurangan kejujuran telah diwujudkan terhadap responden, terdapat risiko serius bahawa responden tersebut mempunyai, akan dan/atau berkemungkinan menjadikan diri mereka terlindung atau dilindungi daripada tuntutan untuk penipuan dan memusnahkan bukti yang akan menjerumuskan mereka dalam penipuan (lihat perenggan 38, 40 & 43).

(4) Penipuan itu didakwa telah dilakukan oleh responden dari 2012 hingga 2015. Mahkamah menerima penjelasan perayu bahawa perayu mengambil masa tiga tahun dari penemuan penipuan itu untuk menjelaskan dan merumuskan pelbagai punca tindakan dan memfailkan tuntutan mereka, dengan mengambil kira bahawa penipuan yang terlibat secara keseluruhan, kira-kira USD2.1 bilion, melibatkan ratusan individu dan entiti tersebar di sekurang-kurangnya enam negara, iaitu, Amerika Syarikat, United Kingdom, Luxembourg, Jerman, Dubai dan Malaysia. Selanjutnya, fakta bahawa terdapat usaha yang diselaraskan

dalam pemulihan sivil di seluruh dunia perayu disokong oleh pemfailan saman serentak di seluruh dunia. Ia bukan kes bahawa saman sekarang dan pelepasan injunksi telah difailkan di Malaysia beberapa tahun selepas saman difailkan di tempat lain. Pada masa atau lebih kurang sama seperti semasa saman difailkan di Malaysia, perayu juga memfailkan saman lain di negara lain di seluruh dunia. Perayu perlu mendapatkan bukti yang diperlukan, untuk memenuhi piawaian 'kes yang boleh dipertikaikan yang baik' dan 'kes prima facie yang sangat kukuh' sebelum memulakan tuntutannya di LHC. Tidak ada kelewatan yang melampau, kelewatan itu tidak melampau dan berkemungkinan menyebabkan prejudis kepada responden, memandangkan penyelarasan yang diperlukan antara pelbagai bidang kuasa (lihat perenggan 48–50 & 53).

(5) Mahkamah mendapati bahawa tiada asas munasabah untuk PK meragui kenyataan perayu yang dibuat oleh pengarah perayu yang merupakan wakil pihak berkuasa kementerian Kerajaan Denmark, dengan bersumpah, dalam afidavit bahawa perayu adalah tidak mengetahui tentang serbuan SØIK 2017 sebelum memohon perintah ex parte dan oleh itu tidak boleh mendedahkan perkara yang sama, yang tidak diketahuinya. Perayu, yang berada di bawah kementerian percukaian, adalah entiti yang berasingan dan berbeza daripada pendakwa negara Denmark bagi Jenayah Ekonomi dan Antarabangsa Serius ('SØIK') yang ditubuhkan di bawah kementerian keadilan dan tindakan dan/atau pengetahuan satu jabatan tidak boleh dikira atau disamakan dengan jabatan yang lain. Adalah adil dan munasabah untuk mengandaikan bahawa SØIK tidak dan tidak boleh mendedahkan hasil serbuan SØIK 2017 kepada perayu, berdasarkan perundangan yang berkaitan di Kerajaan Denmark dan di Malaysia. Ini termasuk peruntukan yang berkaitan dalam Akta Bantuan Bersama Malaysia dalam Perkara Jenayah 2002 yang melarang SØIK daripada berkongsi hasil serbuan SØIK 2017 dengan mana-mana pihak berkuasa lain melainkan kebenaran diberikan secara nyata untuk berbuat demikian (lihat perenggan 55–56 & 70).

(6) Tuntutan perayu berjumlah RM940 juta yang mereka telah ditipu, adalah serius dan besar. Berdasarkan kes rayuan perayu dan keterangan afidavit, mahkamah berpendapat bahawa wujud risiko sebenar untuk kelesapan aset dan pemusnahan keterangan. Oleh itu, perintah ex parte Anton Pillar akan dikembalikan (lihat perenggan 75–76 & 101).

(7) Tuntutan yang difailkan adalah percubaan perayu untuk mendapatkan ganti rugi dan remedi di bawah undang-undang yang diiktiraf oleh Malaysia, khususnya, tort penipuan dan/atau penipuan salah nyata dan bukan berdasarkan hutang yang terakru daripada cukai yang perlu dibayar dan terhutang atau pengelakan cukai di bawah rejim cukai Kerajaan Denmark. Selanjutnya, tuntutan perayu dalam tindakan di LHC tidak timbul daripada rejim cukai Kerajaan Denmark, kerana

responden tidak pernah memiliki saham Denmark dan oleh itu tidak pernah berada dalam rejim cukai Denmark dari mula. Oleh itu, tuntutan perayu untuk mendapatkan semula wang/harta ini tidak berbeza dengan tuntutan yang boleh dibawa oleh mana-mana individu atau entiti persendirian, yang menjadi mangsa penipuan. Berdasarkan perkara yang diketepikan, peraturan hasil tidak terpakai kepada tuntutan perayu (lihat perenggan 80 & 85–86).

(8) Peruntukan statutori, kedua-duanya menurut s 149 Akta Syarikat Labuan 1990 dan s 178 Akta Perkhidmatan Kewangan dan Sekuriti Labuan 2010, bukanlah peruntukan menyeluruh yang memberikan kerahsiaan sepenuhnya kepada syarikat Labuan dan syarikat amanah Labuan. Terdapat alasan yang munasabah untuk mendapati bahawa kerahsiaan yang diberikan kepada kedua-dua syarikat Labuan dan syarikat amanah Labuan tidak sepatutnya kekal dan oleh itu patut diganggu. Pembatalan kerahsiaan itu akan banyak membantu syarikat Labuan dan syarikat amanah Labuan sekiranya mereka sememangnya tidak bertindak menipu perayu. Dalam hal ini, menyamakan pertimbangan untuk membongkar kerahsiaan Labuan sama seperti pertimbangan untuk menolak perintah-perintah inter partes Mareva dan Anton Pillar tidak boleh betul kerana pertimbangan untuk membongkar kerahsiaan Labuan juga mesti merangkumi penilaian yang lebih luas sama ada mana-mana pihak akan menggunakan undang-undang untuk menjejaskan status Labuan sebagai zon perdagangan bebas. Perayu hanya perlu menunjukkan imbangan kebarangkalian melalui keterangan, terdapat sebab untuk memberikan perintah ex parte yang membongkar kerahsiaan Labuan. Alasannya masih benar dan harus dijadikan asas untuk tidak mengenepikan perintah tersebut. Oleh itu, perintah untuk membongkar kerahsiaan Labuan tidak patut diganggu dan patut terus berkuat kuasa untuk membantu Mahkamah Tinggi dalam menentukan kebenaran dakwaan perayu bahawa syarikat Labuan dan syarikat amanah Labuan telah bertindak menipu (lihat perenggan 90–91, 93 & 98–100).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (folld)

Amixco Asia Pte Ltd v Bank Negara Indonesia 1946 [1992] 1 SLR 703, CA (folld)

Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83, CA (folld)

Anton Piller KG v Manufacturing Processes Ltd and others [1976] 1 All ER 779, CA (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors [1985] 2 MLJ 236 (refd)
Brink's-Mat Ltd v Elcombe and Others [1988] 3 All ER 188, CA (refd)
Government of India, Ministry of Finance (Revenue Division) v Taylor and Another [1955] 1 All ER 292, HL (refd)
Hadmor Productions Ltd and others v Hamilton and others [1982] 1 All ER 1042, HL (folld)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316; [2004] 1 CLJ 239, CA (refd)
Lian Keow Sdn Bhd v C Paramjothy & Anor [1982] 1 MLJ 217 (refd)
Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) 1988] 3 All ER 178, CA (refd)
Mbasogo and another v Logo Ltd and others [2007] QB 846, CA (refd)
Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad B Hj Hassan & Ors [2005] 1 MLJ 654, HC (refd)
PJSC National Bank Trust and another v Mints and others [2019] EWHC 2061 (Comm), QBD (folld)
Patterson v BTR Engineering (Aust) Ltd [1990] LRC (Comm) 683, CA (folld)
Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 (folld)
S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)
SKAT Tax Refund Scheme Litigation, In re 356 F Supp 3d 300 (folld)
The 'Niedersachsen' [1983] 2 Lloyd's Rep 600, CA (refd)
Yousif v Salama [1980] 3 All ER 405, CA (refd)

Legislation referred to

Labuan Companies Act 1990 s 149
Labuan Services and Securities Act 2010 s 178
Mutual Assistance in Criminal Matters Act 2002

Appeal from: Civil Suit No LBN-22NCvC-5/6 of 2018 (High Court, Federal Territory of Labuan)

Khoo Guan Huat (Preetha Pillai, Vijay Raj, Kailash Kalaiarasu, Alithea Wong, Joshua Teng Ern Yung and Dickson Chia Chung Ming with him) (Skrine) for the appellant.
Kho Sze Jia (Aik Yin Chien with him) (Izad Kazran & Co) for the first respondent.
Christopher Leong Sau Foo (Abdullah bin Abdul Rahman, Derrick Moh Ka Yew with him) (Chooi & Company + Cheang & Ariff) for the second, third and tenth respondents.
Gregory Ling (Villie Nethi with him) (Ranjit Singh & Yeoh) for the fourth, fifth, 12th, 13th, and 19th to 36th respondents.
James Khong Yoon Hong (Edwin Lim Chear Win with him) (James Khong) for the

sixth, seventh, 11th and 16th respondents.

AG Kalidas Krishnan a/l Gnanaprakasam (Jasmin Anne Raj with him) (K Nadarajah & Partners) for the eighth, ninth, 14th, 15th, 17th, 18th and 37th respondents.

William Lim Wee Chong (Sylvie Tan Sze Ni and Cyrus Lim with him) (Ariff Rozhan & Co) for the 38th and 39th respondents.

Lambert Rasa Ratnam (Chia Oh Sheng and Edmund Yee Chung Hoong with him) (Lee Hishammuddin Allen & Gledhill) for the 40th respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] There are 20 Appeals before this court. They comprised four sets of appeals:

(a) the first set is Appeal No 1130, which is the appeal against the refusal of the learned judicial commissioner ('learned JC') to grant inter partes, a Mareva injunction against the 40 respondents pending the trial of the High Court Suit. The 40 respondents comprised one Labuan company, shareholders and directors of 24 Labuan companies ('Mareva respondents');

(b) the second set of appeals, namely Appeals Nos 1127–1129, 1131–1133 and 1139, are against the setting aside of the appellant's ex parte Mareva order against the same 40 respondents;

(c) the third set of appeals, namely Appeals Nos 1124–1126, 1128, 1618, 1620, 1623 and 1624 are against the setting aside of the ex parte Anton Piller order against ten respondents comprising the four Labuan trust companies and six directors ('AP respondents'); and

(d) the fourth set of appeals, namely Appeals Nos 1134–1137, are against the setting aside of the ex parte order uplifting Labuan secrecy.

BACKGROUND

[2] When the appellant who is the plaintiff, filed the Suit in the Labuan High Court ('LHC'), the appellant simultaneously applied for and obtained ex parte orders for a Mareva injunction ('the ex parte Mareva order') and an ex parte Anton Piller order ('the ex parte AP order').

[3] The appellant also sought an order, lifting the secrecy in the Labuan offshore jurisdiction which had denied the appellant, visibility of the activities of Labuan companies and the Labuan trust companies ('order uplifting Labuan secrecy').

[4] The respondents filed their respective applications to set aside the appellant's ex parte Mareva and Anton Piller orders, the order uplifting Labuan Secrecy and also the appellant's inter partes application for a Mareva order.

THE DECISION OF THE LABUAN HIGH COURT

[5] In the LHC, the learned JC after hearing submissions, made the following orders namely:

(a) that the inter partes Mareva Injunction application under encl 5 is dismissed with costs;

(b) an order in terms of the notices of application filed by the respondents to set aside the Mareva order under encls 141, 149, 155, 189, 253, 364 and 368 with costs;

(c) an order in terms of the notices of applications of the respondents to set aside the Anton Piller order under encls 140, 145, 156 and 190 with costs; and

(d) an order in terms of the notices of applications of the respondent to set aside the secrecy order under encls 142, 148, 183 and 191 with costs.

[6] The appellant, being aggrieved by the LHC's various orders appealed against them.

[7] We heard the appeals, after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeals and unanimously allowed the appeals with costs. We propose to give reasons for our decision with respect to the appeals.

[8] For ease of reference, the plaintiff in the High Court below shall be referred to as the appellant, and the defendants in the High Court shall be referred to as the respondents respectively.

THE APPELLANT'S PLEADED CLAIM

[9] The appellant is the Customs and Tax Administration of the Kingdom of Denmark ('SKAT'), seeking to recover losses of approximately RM940m which, the appellant claims, was caused by a fraud perpetrated by the respondents.

[10] The appellant contended that the fraud which is committed from Labuan, Malaysia, is part of a worldwide scheme, to defraud the appellant

through various entities in the UK, USA, Dubai, and Malaysia. The appellant was defrauded of approximately DKK12 billion through this worldwide scheme between 2012 to 2015.

[11] The appellant also contended that Malaysia was utilised because of the Double Taxation Avoidance Agreement with the Kingdom of Denmark ('DTA'). Under the DTA, a Malaysian tax resident who owns Danish corporations' shares and earns dividends on those shares is entitled to a refund of the monies withheld by the appellant as taxes on the dividends issued on those Danish shares. These withheld taxes amounted to 27% of the total value of the dividends paid.

[12] After three years' of investigation by appellant, it revealed complex layers of fictitious transactions spanning multiple jurisdictions and in May to June 2018, the appellant filed civil actions and/or interim remedies at or about the same time in United Kingdom, the United States of America, Dubai, and in the LHC.

[13] In the appellant's suit in the LHC, the appellant pleaded fraudulent misrepresentation conspiracy to defraud, knowing receipt, and dishonest assistance against the following:

(a) the 24 Labuan companies (the first to 24th defendants in the LHC, ('Labuan companies') which incorporations took place on short periods of time, involving many common dates of incorporation;

(b) their directors and shareholders (the 25th to 60th defendants in the LHC, ('directors/director respondents'); and the 61st to 63rd defendants in the LHC ('shareholders/shareholder respondents'); and

(c) four Labuan trust companies (the 64th to 67th defendants in the LHC, ('the LTCs/LTC respondents') which set up the 24 Labuan companies on instructions from the shareholders and whose own employees, officers, and/or directors were placed in the Labuan companies as the directors.

[14] The appellant further contended as follows:

(a) between 2014 and 2015, the appellant contended that the Labuan companies, its directors, authorised representatives and/or shareholders defrauded the appellant of monies. Additionally, any one or more of the Labuan companies and its corresponding directors, authorised representatives and/or shareholders conspired or jointly with the Labuan trust companies or any one or more of them to defraud the appellant, of the monies;

(b) the applications for the refund of the withheld tax were made by the

Labuan companies through their agents pursuant to the DTA. The refund applications were accompanied by, inter alia, false confirmations by certain stock brokers of purported shares held by the Labuan companies in Danish corporations and dividend payments thereon. There were altogether three such agents and four such stock brokers ('agents' and 'stock brokers', respectively);

(c) the agents were appointed by way of a power of attorney ('POA') by each of the Labuan companies shortly after the latter's incorporation. The POAs were executed within short periods of time and often on identical dates and were executed by the directors and/or authorised representatives of the Labuan companies who are also the officers and/or directors of the Labuan trust companies. The POAs authorised the agents, who were foreigners, to directly collect/obtain payments from the appellant, pursuant to the refund applications;

(d) the Labuan companies proceeded to submit a total of 215 applications for a refund of purportedly withheld dividend tax to the appellant through their agents. Each application for refund consisted of a standard template form which was submitted with necessary supporting documents;

(e) all the 215 refund applications were identical in nature and handled by the three agents. For each refund application, the respective agents would submit on behalf of a Labuan company to the appellant, the following:

(i) a covering letter printed with the agent's letterhead and addressed to 'SKAT';

(ii) a 'SKAT' template form (Reference No 06.003 Eng) entitled 'Claim to Relief from Danish Dividend Tax', on which the agent directed the appellant to make the payment into the agent's account. The form filled in by the agent, falsely represented;

(iii) that the Labuan company concerned was the beneficial owner of shares of certain Danish corporations and had received dividends on those shares;

(iv) the amount claimed is for the repayment of the purported withheld dividend tax;

(v) that the Labuan company was covered by the DTA and which coverage was certified by the agent;

(vi) a false or falsified 'credit advice' or 'dividend credit advice' issued by one of the stock brokers to describe the purported shareholding of the Labuan company in the Danish corporation concerned and dividend payment details;

(vii) a POA signed by the director and/or authorised representative who are also the officers and/or directors of the Labuan trust companies, specifically appointing the agent concerned to act on behalf of the Labuan company to seek refund of withheld dividend tax; and

(viii) a 'Certificate of Status of Tax Residence' issued by the Inland Revenue Board of Malaysia, certifying that the Labuan company was, inter alia, a resident company in Malaysia.

(f) this modus operandi was then repeated for all 24 Labuan companies. The refund applications to the appellant contained the following fraudulent misrepresentations that were made by the Labuan companies through the agents namely:

(i) that the Labuan companies were shareholders of Danish corporations who had received dividends on their shareholdings;

(ii) that the appellant had withheld 27 % of the dividend income that accrued on the said shareholdings as tax; and

(iii) that the Labuan companies by virtue of them, being Malaysian tax residents were entitled to a refund of the withheld tax pursuant to the DTA.

(g) the appellant contended that the Labuan companies never owned shares in the relevant Danish corporations and consequently, they are not entitled to receive dividends on the shares described in the refund applications, and accordingly, no sum would have been withheld from them as they were not so entitled to receive any dividends, in the very first place;

(h) induced by and acting upon the fraudulent misrepresentations in the refund applications, the appellant paid a total of approximately RM940m to the agents. The payments were made by bank transfers to the agents in 34 tranches between June 2014 to July 2015. Particulars of the sums paid out are listed in Part F, statement of claim. Exhibit SKAT-AP-8 of the affidavit in support comprises true copies of the relevant bank's (Danske Bank) remittance advices in respect of the 34 tranches/payments, evidencing the payments made by the appellant to the respective agents on the 215 refund applications;

(i) arising from the above, the appellant has suffered losses and damage, being the sums paid out to the Labuan companies, through their agents;

(j) the Labuan companies and/or its Directors, authorised representatives, shareholders, made the said representations fraudulently knowing that they were false and untrue or without caring whether they were correct or true;

(k) the Labuan trust companies, in turn, placed their officers and/or directors including the individual AP respondents as directors in various Labuan companies and the latter's corporate directors;

(l) under such circumstances, the Labuan trust companies themselves ought to be regarded as being, similar to the directors of the Labuan companies and the Labuan trust companies should not therefore be permitted to shield themselves behind their officers and employees that they had placed as directors of Labuan companies. The appellant pleaded that the Labuan trust companies, by virtue of such placement, participated in and/or facilitated the said fraudulent misrepresentations;

(m) the appellant further pleaded that the directors, authorised representatives and/or shareholders, being the controllers of the Labuan companies, caused the said companies to commit the fraud and accordingly, that the directors, authorised representatives and/or shareholders are themselves principally culpable for the fraud perpetrated against the appellant. The appellant pleaded that the corporate veil separating the 24 Labuan companies and its controllers should be pierced for the purpose of the appellant's claims herein;

(n) apart from fraudulent misrepresentation and conspiracy to defraud, the appellant's causes of action against the respondents involve unjust enrichment, constructive trust, resulting trust, knowing receipt and dishonest assistance;

(o) the above described fraud/conspiracy to defraud is part of a larger worldwide scheme using similar methods. Since its discovery in late 2015, the appellant has had to investigate and compile evidence from five different jurisdictions to uncover the scheme, namely the United States of America, the United Kingdom, Canada, Luxembourg and Malaysia; and

(p) the Labuan companies had, through their agents, made the fraudulent misrepresentations and the appellant was thereby induced to make the relevant payments to the Labuan companies, through the agents, on the assumption that the payments amounted to refunds of withheld dividend tax when that was not the case. Thus the appellant was thereby defrauded and has suffered loss.

THE RESPONDENTS' PLEADED CASES

[15] Even though the respondents who are represented by different sets of lawyers and have separately filed their various High Court applications to challenge the appellant's various applications, the grounds relied upon by them for their respective applications are along similar veins, namely that:

(a) there had been material non-disclosure by the appellant in the ex parte applications and extending to the inter parte applications;

(b) the appellant does not have a good arguable case, to entitle it, the Mareva order;

(c) the appellant does not have an extremely strong prima facie case to entitle it, the Anton Piller order;

(d) the appellant has not shown that there was risk of dissipation of the assets by the relevant respondents;

(e) the appellant has not shown a real possibility of destruction of material by the relevant respondents;

(f) that the Revenue Rule applies; and lastly

(g) there was a delay in the making of the appellant's ex parte and inter parte applications

THE RELEVANT LAW AND PRINCIPLES

[16] The appellant's appeals are against discretionary decisions of the learned JC, in granting the various interlocutory injunctions and orders.

[17] The appeals before us, concerned applications based on affidavit evidence for interlocutory injunctive orders, unlike an originating summons or a summary judgment application seeking final judgment/orders. As such, we are guided by the principles set out in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 where the court held, inter alia:

> *[The] evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.* (see p 509-d)
>
> ...
>
> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.* (see p 510-d)
>
> ...
>
> One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court

A in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing. (see p 510-e)

...

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a B significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts C disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case. (Emphasis added.)

D **[18]** Further, the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, held that when hearing an application for an interlocutory injunction, a judge must:

(i) Ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind E that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial ... (p 206-I)

...

F Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies ... The judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, ... (p 207-C)

...

G The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, ... It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such H as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account ...

I **[19]** The above principles showed that, at the interlocutory stage of the proceedings, it is not the duty nor the role of the High Court to resolve and finally determine conflicts of affidavit evidence on a balance of probabilities (ie like for an application for summary judgment/originating summons). Instead, the High Court is merely tasked to determine whether the applicant has met a

sufficient threshold based on the affidavit evidence put forward at this stage. Justice of the matter should weigh heavily in the court's mind, namely that it is just and convenient to provide an interim remedy to an applicant seeking to preserve status quo pending the full determination of issues at trial.

[20] This court sitting as an appellate court of review, in hearing these appeals, has a limited function. Guidance can be found in *Hadmor Productions Ltd and others v Hamilton and others* [1982] 1 All ER 1042, wherein Lord Diplock held (see p 1046a–e of the report):

> (i) An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. *On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.*
>
> (ii) *The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, …*
>
> (iii) Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. (Emphasis added.)

CONSIDERATION OF THE FIRST SET OF APPEAL NAMELY: NO 1130 (THE APPEAL AGAINST THE LEARNED HIGH COURT JUDGE'S REFUSAL TO GRANT AN INTER PARTES MAREVA INJUNCTION AGAINST THE 40 RESPONDENTS) AND THE SECOND SET OF APPEALS, NAMELY: APPEALS NOS 1127–1129, 1131–1133 AND 1139, ARE AGAINST THE SETTING ASIDE OF THE APPELLANT'S EX PARTE MAREVA ORDERS AGAINST THE SAME 40 RESPONDENTS

[21] The Mareva respondents are:

(a) the first to 24th respondents which are the Labuan companies;

(b) the 25th to 60th respondents are its directors and authorised representatives as controllers/alter egos of the Labuan companies; and

(c) the 61st to 63rd respondents are its shareholders as controllers/alter egos of the Labuan companies.

[22] The purpose of a Mareva injunction is well laid down in *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 at p 187, where the court held:

> [...] the sole *purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action*, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, [...]
>
> [...] the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, inter alia, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and *that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.* (Emphasis added.)

[23] For a Mareva application, there are three pre requisites to satisfy before the court may issue a Mareva injunction. They were set out by Mohamed Azmi SCJ (as he then was) in the majority decision of the Supreme Court case of *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 and they are as follows:

(a) the applicant must show that it has a good arguable case;

(b) that the defendants have assets within jurisdiction; and

(c) that there is a risk of the assets being removed before judgment could be satisfied.

Is there a good arguable case on the merits of the appellant's case?

[24] The test for a 'good arguable case' is one which is more than barely capable of serious argument but not necessarily one which has to be better than 50% chance of success. This was laid down in the English Court of Appeal decision of *The 'Niedersachsen'* [1983] 2 Lloyd's Rep 600 and as applied by the Singapore Court of Appeal in *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703.

[25] The appellant contended that under Danish laws, a sum would ordinarily be withheld from a dividend payment to a shareholder in a Danish corporation as a deduction on account of tax on dividend income. However under the Double Taxation Agreement between Malaysia and Denmark, shareholders of a Danish corporation who are residents in Malaysia may claim a full refund of the 27% tax withheld by the appellant, from the dividend income accruing from their shares. In the present appeals, there were 215

refund applications made by three agents acting on behalf of the Labuan companies amounting to about RM940m which the appellant is contending, are false as the Labuan companies did not own the various shares in Danish companies.

[26] The appellant has produced confirmation from VP Securities A/S which is the Central Securities Depository in Denmark authorised by the Danish Financial Supervisory Authority (Finanstilsynet) in accordance with the Danish Securities Trading Act that the Labuan companies never owned shares in the relevant Danish corporations which are the subject matter of the refund aplications. VP Securities A/S having examined their records have confirmed that there is no record of the Labuan companies having owned and/or dealt with the purported shares in the relevant Danish corporations trading on its Stock Exchange at the material times.

[27] We find that the appellant has shown that there is no credible evidence before this court, that the Labuan companies had owned and/or dealt with the purported shares in the relevant Danish corporations which are the subject matter of the appellant's claim. The appellant have adduced unrebutted evidence to show that the relevant respondents do not owned shares in the relevant Danish corporations and therefore never received dividends thereon and thus no sum had been withheld from them. To our mind, if indeed, the Labuan companies owned the said shares in the relevant Danish corporations, the simplest thing for the respondents to do, is to produce evidence to rebut the appellant's contention and bring the whole matter to an amicable end. However, there was no such evidence produced.

[28] Additionally the appellant has shown the inherent financial inability of the Labuan companies to own the volume of Danish shares they claimed to have owned.

[29] In the light of the forgoing, we are of the considered view that the appellant has shown a good arguable case in respect of the Mareva orders.

Are there any assets within (and outside) the jurisdiction?

[30] In the High Court case of *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad B Hj Hassan & Ors* [2005] 1 MLJ 654, Abdul Malik Ishak J (as he then was) granted a worldwide Mareva injunction and made the following observations at pp 673H and p 680C respectively:

> [18] ... *A Mareva injunction is said to assist justice. Assets sufficient to satisfy the particular plaintiff's claim, should he succeed in obtaining judgment, may be 'frozen' by a Mareva injunction. I even venture to say that a 'worldwide' Mareva injunction may even be granted where the assets which are to be frozen are wholly located abroad or*

where some of the assets are within the jurisdiction and some are abroad.

> [36] ... the Mareva injunction in the context of the present case serves as a remedy for the purpose of restraining a judgment debtor or a potential judgment debtor from committing the abuse of dissipating or hiding clandestinely assets that the judgment creditor might lawfully attach for the purpose of satisfying a judgment that is to be given or likely to be given in his favour. That would be the scenario for the plaintiffs as against the defendants especially Ahmad Hassan, Asasi and the fifth defendant. As the judgment creditors the plaintiffs were entitled, so to speak, to the Mareva injunction as against the judgment debtors like Ahmad Hassan, Asasi and the fifth defendant, so to speak. It was as simple as that. (Emphasis added.)

[31] From the evidence adduced, we are of the considered view that there is clear evidence to show that the Mareva respondents are domiciled and/or have business dealings within Malaysia and are therefore likely to have assets within the jurisdiction.

[32] Based on the financial statements of the Labuan companies which are exhibited in exh SKAT-M-11 by the appellant, we find that the Mareva respondents may have already dissipated the monies elsewhere within or outside Malaysia, making it imperative that whatever assets still within their control both within and outside Malaysia be preserved.

[33] From our perusal of the financial statements exhibited in exh SKAT-M-11, they showed that the Labuan companies had disbursed the dividends to its shareholders, to reduce their net worth to minimal and in at least four of the Labuan companies, the shareholders had intention to voluntarily wind up the Labuan companies.

[34] We are also of the considered view that given the worldwide extent of the fraud as pleaded by the appellant, a Mareva injunction which is limited to the Mareva respondents' assets within Malaysia would not be sufficient to adequately safeguard the appellant against a risk of dissipation. Thus, we find that the appellant should be granted a Mareva injunction, not limited to the assets within the Malaysian jurisdiction but a worldwide Mareva injunction against assets anywhere in the world belonging to the Mareva respondents.

Is there any risk of assets being removed before judgment could be satisfied?

[35] The learned JC held, inter alia, that the appellant had made out an extremely strong prima facie case and a good arguable case that the respondents defrauded the appellant of almost RM1 billion. In so finding, the learned JC appreciated that:

> there was no credible evidence that the Labuan Companies had owned or dealt with shares in Danish corporations entitling them to seek the withholding tax refund in

the billions and that had they actually owned the shares (as) it would have been the easiest thing for the defendants (Respondents) to show to Court.

[36] Even though the learned JC found that there was an extremely strong prima facie case that the respondents had defrauded the appellant, the learned JC found that there was no risk of dissipation of assets and risk of destruction of evidence. These are the learned JC's findings:

[6] However, that is not the end of the matter, as the law requires the plaintiff to also show that there was risk of dissipation of assets and in respect of the Anton Piller order, risk of destruction of the materials or evidence. This is the part where I regretfully find that the plaintiff had been less than forthcoming with disclosure when obtaining the ex parte orders.

[7] The defendants had referred this court to the 2017 search and seizure exercise conducted at the request of SØIK which is under the Ministry of Justice, Denmark. This particular fact was not disclosed to this court at the hearing of the ex parte applications. The exhibits referred to by the defendants show that at the very least, the plaintiff would have been made aware of the investigation by SØIK as at 30 April 2018.

[8] *However, I find it highly questionable that the Plaintiff had chosen not to disclose this fact to the court.*

[...]

[9] *On this, I agree with the submissions for the defendants that had it been disclosed, the Plaintiff would not have been able to establish that there was a risk of dissipation of assets and/or destruction of materials as by the 2017 search and seizure exercise, the defendants would have already had the opportunity and time to dissipate and/or destroy evidence had they wanted to. As it is, I do not find the evidence before me credible to suggest that there is such risk.* I have also on this point taken into account the fact that the alleged fraud was perpetrated since the year 2015 but it took the plaintiff some three years before making the applications. This also bearing in mind that based on the evidence, the plaintiff must have already been aware of the weaknesses in its system since 2010. (Emphasis added.)

[37] We are unable to agree with the learned JC's finding and find that the learned JC misdirected herself, in coming to such a finding in light of the available evidence as in our mind, we find that the appellant was able to establish the following:

(a) that the 24 Labuan companies, incorporated in the span of seven months with minimal share capital and had no tangible business operations, set up expressly as vehicles for this fraud;

(b) that the LTC respondents set up this 24 Labuan companies on instructions from the Shareholder respondents and placed their own employees, officers, and/or directors in these companies;

(i) these 24 Labuan companies then submitted 215 applications ('refund

A applications') claiming with fictitious documents that they:

(A) were owners of billions worth of Danish corporations' shares when there were serious doubts they could not have been and were not owners of such shares;

B (B) had received net (73%) dividends worth billions of Danish Krone on these shares when they did not receive any such net dividends; and

(C) were Malaysian tax residents — when they could not have been Malaysian tax residents as no management and control was exercised in Malaysia.

C (c) that the 24 Labuan companies purporting to be Malaysian tax residents, submitted 215 refund applications claiming that they were entitled to the benefits of the DTA, thereby misappropriating monies withheld by the appellant purporting to be the 27% of the full dividends earned on the Danish corporations' shares;

D (d) the transactions, namely the purported ownership of Danish corporations' shares and receipt of net dividends, were in serious doubt; and

(d) the Directors and the LTCs are offshore experts with easy links to other offshore jurisdictions and the Shareholders, experts in sophisticated derivatives E trading operating in the worldwide markets, would be able to conceal documents with ease.

[38] We are also of the opinion that there was evidence that the respondents F would dissipate, divert, conceal and/or mask their assets, and would destroy or hide evidence and they are as follows:

(a) evidence that part of these proceeds were remitted to the shareholders themselves and to entities in which they were the sole shareholder;

G (b) evidence that all the individual respondents are signatories of the Labuan companies' bank accounts, having control of and over the Labuan companies' bank account and were therefore directly responsible for dissipating, diverting, concealing and/or masking monies that were originally in the said accounts; and

H (c) evidence that the respondents wound up the Labuan companies soon after they were emptied of monies and continued and/or initiated the dissolution notwithstanding that the Labuan companies and their counterparts were under a criminal investigation.

I **[39]** We also noted that the directors, in their pleaded defence, stated that they declared to the Malaysian Inland Revenue Board that the management and control of the Labuan companies were exercised in Labuan, utilising the said board minutes executed by them, to declare that they were managing and controlling the Labuan companies and that the Labuan companies are entitled

to receive dividend income from, inter alia, Denmark. Such declaration was for the purpose of obtaining a Malaysian Tax Residency Certificate, to be included in the fraudulent refund applications to the appellant. It is pertinent to note that the said Certificate of Malaysian Tax Residency issued was the vital supporting document, in the making of the withholding tax refund claims.

[40] We further noted that the directors executed powers of attorney authorising tax agents to make the withholding tax refund claims on the basis that the Labuan companies were entitled to claim a refund of the monies withheld on dividend payments when evidence showed that they were not so entitled as there was no evidence that the Labuan companies owned shares and although none of the Labuan companies received the initial 73% of the dividend payments.

[41] In *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83, the Court of Appeal upheld the grant of the Mareva injunction and found that there was a risk of dissipation as the Court of Appeal found that there were inconsistencies in the documents and the defendant's defence and affidavit. Further the Court of Appeal also found that the defendant's conduct was lacking in probity and honesty, thus, a real risk exists that the defendant would dissipate his assets. The court there held (at p 89):

> ... I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty. In the circumstances, I conclude that there is a real risk that the assets of the appellant will dissipate should the respondent succeed at the trial.
>
> ... the nature of the scheme in which, on the evidence to date, the appellant appears to have engaged, is such that it is reasonable to infer that he is not the sort of person who would, unless restrained, preserve his assets intact so they might be available to his judgment creditor.

[42] In determining whether there is a risk of assets being removed, lack of probity and honesty can be determining factors, in drawing a conclusion that there is such a risk of dissipation. We are guided by the following cases:

(a) the Court of Appeal case of *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83;

(b) the High Court case of *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261;

(c) the Singapore Court of Appeal decision in *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703; and

(d) the High Court decision of *Patterson v BTR Engineering (Aust) Ltd* [1990] LRC (Comm) 683.

[43] In the light of our above findings, we find that the appellant has shown that in cases of complex financial fraud, particularly where financial dishonesty and a lack of probity is established against the respondents, there is a serious risk that such respondents have, will and/or are likely to make themselves, shielded or protected against the claim for fraud and destroy evidence that will incriminate them in the fraud.

Was there any inordinate delay in the application for the Mareva injunctions

[44] In respect of this issue, we are of the considered opinion that the learned JC's finding that it took the appellant, some three years to file the requisite applications, erroneous:

> [9] [...] I have also on this point taken into account the fact that the alleged fraud was perpetrated since the year 2015 but it took the plaintiff some three years before making the applications. This also bearing in mind that based on the evidence, the plaintiff must have already been aware of the weaknesses in its system since 2010.

[45] In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, Jemuri Serjan CJ (Borneo) (as he then was) held that in considering the lapse of time, delay commences from the discovery of the circumstances giving title to the relief and that the significant factor to be considered, is not so much the length of the delay but whether the delay has made it, unjust to grant the injunction claimed.

[46] The respondents contended that the appellant averred that the alleged fraud was discovered in late 2015 and the appellant's claim was filed on 13 June 2018. Therefore, there was a lapse of time of 2 1/2 years. Further the facts which formed the basis of the appellant's allegations of fraudulent misrepresentation in its claim filed in June 2018, are the same as those that it had discovered in late 2015. This is reflected at para 103 of the statement of claim where it is stated:

> 103. Sometime in late 2015, the Plaintiff discovered that the representations made by the Labuan Companies as set out above were untrue. Pursuant to the discovery, the Plaintiff has taken steps to revoke the approval of the refund applications earlier granted and is seeking to recover its losses across multiple jurisdictions.

[47] Thus the respondents contended that computation of the delay must therefore be calculated at least from late 2015. Further, this delay is compounded by the one year's gap between the raid by the Danish State Prosecutor For Serious Economic and International Crime ('SØIK'), another governmental authority of the Government of Denmark which requested the Royal Malaysian Police to conduct a raid in 2017 (the '2017 SØIK Raid') and the filing of the appellant's claim. On this ground, although the ex parte orders had been granted, they were then rightly set aside and any inter partes

application for the orders ought to be refused. Further, the delay shows that the injunctions were not really needed and the orders were themselves draconian. Thus the appellant is guilty of an inordinate and inexcusable delay and this court should deny Mareva relief in respect of the inter partes Mareva (Appeal 1130).

[48] From the evidence, we find that the fraud was allegedly perpetrated by the respondents from 2012–2015. We accepted the appellant's explanation that it took three years from the discovery of fraud to crystallise and formulate the various causes of action and file their claim, bearing in mind that the fraud involved in total, approximately USD2.1 billion, involving hundreds of individuals and entities dispersed over at least six countries, namely, the United States of America, the United Kingdom, Luxembourg, Germany, Dubai and Malaysia. The Reuters' article dated 23 May 2018, a copy of the which was marked as 'Exhibit SKAT M-12' which is entitled 'Denmark begins global legal campaign to recoup tax fraud billions', reported that the appellant may be instituting action in Malaysia, again provides contemporaneous proof that the appellant was only ready as of May 2018, to file a civil action to recover its monies.

[49] Further, the fact that there was a coordinated effort in the appellant's worldwide civil recovery is supported by contemporaneous filings of suits across the world. It is not the case that the present suit and injunctive reliefs were filed in Malaysia some years after suits were filed elsewhere. At or about the same time as when the suits were filed in Malaysia, the appellant also filed the other suits in other countries across the world.

[50] In 2017, SØIK requested the Royal Malaysian Police to conduct the 2017 SØIK Raid against the Labuan trust companies which showed that investigations were ongoing, and that even SØIK, with their massively wider reach and powers were still investigating the fraud as of May 2017. SØIK was also able to utilise the powers under the Mutual Assistance in Criminal Matters Act 2002. On the contrary, the appellant, without such powers, had to secure the requisite evidence, to meet the standard of a 'good arguable case' and 'an extremely strong prima facie case' before commencing its claim in LHC.

[51] In those circumstances, we find that it is more than reasonable to hold that if SØIK, with its armoury of investigatory powers, required two years before making a request for mutual assistance, the appellant, whose only recourse is the civil court, would require more time and efforts to prepare and formulate their civil claim in fraud.

[52] Guidance can be found in *PJSC National Bank Trust and another v Mints and others* [2019] EWHC 2061 (Comm) where the court held that even

A if there was any 'delay', such 'delay' would not be regarded as material 'in view of the complexity of the transactions and the evidence, and the need to ensure that all relevant facts were fairly disclosed to the court'.

B **[53]** In the light of the above, we are of the considered view that there is no inordinate delay, that the delay was not inordinate and would be likely to cause prejudice to the respondents, given the coordination required between the multiple jurisdictions.

Full and frank disclosure — Any material non-disclosure?

C

[54] In the present appeal, the learned JC found that the appellant failed to disclose the 2017 SØIK Raid which was a material non-disclosure which warranted the setting aside of the ex parte Mareva, Anton Piller and uplifting of Labuan secrecy orders.

D

[55] From the evidence before us, we find that there was no reasonable basis for the learned JC to doubt the appellant's averments which was made by a Director of the appellant who is a representative of a ministerial authority of the Kingdom of Denmark, on oath, in an affidavit that the appellant was not aware of the 2017 SØIK Raid prior to applying for the ex parte orders and therefore could not have disclosed the same, which it was not aware of.

E

[56] Further, the appellant which is the Customs and Tax Administration of the Kingdom of Denmark which comes under the Ministry of Taxation, is a separate and distinct entity from the Danish State Prosecutor for Serious Economic and International Crime ('SØIK') which is constituted under the Ministry of Justice and that the actions and/or knowledge of one department cannot be imputed or equated to that, of the other.

F

G

[57] In the seminal English case of *Brink's-Mat Ltd v Elcombe and Others* [1988] 3 All ER 188 (CA), Ralph Gibson LJ explained the onerous and compelling duty placed on an applicant in an ex parte application in the following manner:

H

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs case* [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* [1850] 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v. Schott Industrial Glass Ltd* [1981]

I

FSR 289 at 295 per Browne-Wilkinson J (iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. A

The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v. Robinson* [1986] 3 All ER 338; [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at 92–93 per Slade LJ. (v) If *material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty …* ': see Bank Mellat v. Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case. (vi) *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application.* B C D

The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v. Nikpour* [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: E F

> … when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.
>
> (See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 at 183 per Glidewell LJ). (Emphasis added.) G H

[58] In *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2004] 1 CLJ 239, the Court of Appeal explained the duty of disclosure as follows:

> 33. It is trite law that *in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant.* In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Law Rep 428, His Lordship Bingham J (as he then was) said this at p 437: I
>
> Failure to make full and fair disclosure

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents.
>
> He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. *If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.* Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263; *Bank Mellat v Nikpour* [1985] FSR 87, The other principles have not been the subject of detailed challenge. (Emphasis added.)

[59] Thus, it will be seen that in the event of material non-disclosure, the court may discharge the ex parte order even if it is established that the order would have been made, had there been full disclosure. The court must be given the opportunity to consider material facts although it might eventually decide in favour of the plaintiff on a particular non-disclosure: *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 at p 183.

[60] The respondents contended that the appellant, being a governmental authority of the Government of Denmark, knew of the 2017 SØIK Raid and/or of a criminal investigation that was in progress and that evidence had been taken by the Government of Denmark. It ought to have, but did not, disclose that fact to the LHC when applying ex parte.

[61] The respondents further contended that there can be no doubt that SØIK and the appellant are authorities of the same Government of Denmark. The fact that the appellant is merely part of the Kingdom of Denmark is reflected in the letter dated 1 August 2018 from the appellant's solicitors where it was asserted that the appellant was a public authority of the Kingdom of Denmark. Thus the appellant cannot feign ignorance.

[62] Further, there is evidence that the appellant had knowledge, prior to applying ex parte, that SØIK had documents which are relevant to the claim

that were obtained pursuant to the 2017 SØIK Raid. The evidence is in the form of a letter dated 3 April 2018 from the appellant's Danish solicitors, Kammeradvokaten to SØIK and the reply dated 30 May 2018 from SØIK to Kammeradvokaten. These were not also disclosed when applying ex parte.

[63] It was only at the inter partes stage that the appellant produced a copy of the letter from its solicitors to SØIK dated 3 April 2018, which is a date before the filing of the appellant's claim herein and which letter is redacted in most parts. The pertinent portions of the disclosed parts of the letter dated 3 April 2018 showed, inter alia, that it was a request for release of material concerning the pension plans and the Malaysian companies involved in the dividend case as well as other materials and information on the 24 Malaysian companies identified by the appellant, as being involved in the case.

[64] The respondents further contended that the reply from SØIK is dated 30 May 2018 which is redacted for most parts when produced in court, also bears a date before the filing of the appellant's claim herein. It was also produced by the appellant only at the inter partes stage. The above letters showed the following:

(a) the appellant knew that documents and evidence had been obtained by SØIK pursuant to an investigation involving the Malaysian authorities;

(b) the appellant knew that the consent of the Malaysian authorities could be sought for the documents obtained by SØIK; and

(c) the appellant had made repeated requests to SØIK for the documents obtained by the latter.

[65] Further, in an email dated 6 August 2018, the appellant's Danish solicitors had informed SØIK that the Malaysian Attorney General's Chambers ('AGC') had expressed no objection to SØIK sharing the documents and evidence obtained. This email showed that:

(a) the appellant knew that documents and evidence had been obtained by SØIK;

(b) the appellant knew that the consent of the AGC may be sought for the documents obtained by SØIK; and

(c) repeated requests had been made previously from the AGC for the documents obtained by SØIK.

[66] Thus, the appellant, being a body of the Kingdom of Denmark, also did not disclose when applying ex parte the following:

(a) the letters dated 3 April 2018 and 30 May 2018 between the appellant's Danish solicitors, Kammeradvokaten and S0IK; and

(b) that the appellant could have made a request to the Government of Malaysia, namely the AGC, to have access to all the evidence obtained by SØIK in the 2017 Raid and/or from the Malaysian authorities in a criminal investigation that was in progress.

[67] This showed that there was deliberate material non-disclosure at the ex parte stage and continuing at the inter partes application. Further, the aforesaid facts showed that with proper enquiries, the appellant would have been able to know of the 2017 SØIK Raid and could have made a full and fair disclosure of this material fact. But the appellant has failed to disclose what proper enquiries, it had made. Both the failures to make proper inquiries and/or to disclose the proper inquiries amount to lack of full and frank disclosure at the ex parte stage which continued at the inter partes stage (see *Brink's-Mat Ltd v Elcombe and Others*).

[68] If disclosed, the LHC would also have known that the respondents gave full cooperation in the 2017 SØIK Raid and it would have been clear to the court that there was no urgency in the applications given that the ex parte orders were sought one year after the 2017 SØIK Raid.

[69] The respondents thus contended that the court was also entitled to know when considering the various ex parte applications, the type of the evidence sought under the 2017 SØIK Raid, the type of the evidence seized, the reasons for the non-seizure of any evidence sought and the need for additional evidence sought under the Anton Piller application.

[70] We accepted that it is fair and reasonable to assume that SØIK did not and could not have disclosed the yield of the 2017 SØIK Raid, to the appellant based on the pertinent legislations in the Kingdom of Denmark and in Malaysia. This included relevant provisions in the Malaysian Mutual Assistance in Criminal Matters Act 2002 which prohibited SØIK from sharing the yield of the 2017 SØIK Raid with any other authority unless consent is expressly given to do so.

CONSIDERATION OF THE THIRD SET OF APPEALS, NAMELY APPEALS NOS 1124–1126, 1128, 1618, 162 0, 1623 AND 1624 ARE AGAINST THE SETTING ASIDE OF THE EX PARTE ANTON PILLER ORDER AGAINST TEN RESPONDE NTS COM PRISING THE FOUR LABUAN TRUST COMPANIES AND SIX DIRECTORS

The revelant law and principles

[71] The relevant principles applicable for the grant of an Anton Piller order were laid down in *Anton Piller KG v Manufacturing Processes Ltd and*

others [1976] 1 All ER 779 which states the following requirements to warrant a grant of an Anton Piller order namely:

(a) an extremely strong prima facie case;

(b) serious damage, potential or actual, for the plaintiff;

(c) the defendants have in their possession incriminating documents or things; and

(d) there is a real possibility that they may destroy such material if forewarned.

[72] The jurisdiction for the grant of an Anton Piller order extends to the preservation of documents or materials that may be evidence which the plaintiff genuinely fears that the defendant would destroy prior to the hearing of the action. See *Yousif v Salama* [1980] 3 All ER 405, *Lian Keow Sdn Bhd v C Paramjothy & Anor* [1982] 1 MLJ 217, *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236 and *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97.

Whether the appellant has an extremely strong prima facie case

[73] In the LHC, the appellant vide encl 9, applied for an ex parte application for an Anton Piller order on the terms which were set out in the said application. For the ex parte Anton Piller order and the secrecy order, the LHC was faced with only the setting aside applications by the various sets of respondents.

[74] The appellant's said application is being made against the 64th to 67th respondents ('Labuan trust companies' or 'corporate AP respondents') as well as six of their directors namely the 25th, 29th, 30th, 34th, 36th and 60th respondents ('individual AP respondents') who are also directors of some of the Labuan companies.

Is there serious dam age, potential or actual, for the appellant?

[75] Based on the evidence adduced, we find that the appellant's claim amounting to RM940m which they were defrauded of, is serious and substantial.

Whether the ap respondents have in their possession relevant documents or materials? And whether there is a real possibility that the ap respondents may destroy such material if forewarned?

[76] In the light of the appellant's pleaded case and the affidavit evidence especially pertaining to the fact that Labuan companies were corporate vehicles utilised to carry out the fraud, that sham certificates of Malaysian Tax Residency and power of attorney for the Fraudulent Refund Applications were utilised, that the various transactions in respect of the purported ownership of the Danish shares, that the purported receipts of dividends arising therefrom, that the fraud was complex and widespread involving entities in several jurisdictions and the co-ordinated voluntary winding up of the Labuan companies, that the Shareholders are foreigners with high international financial know-how and experiences and that the Directors of the Labuan companies have signed, inter alia, sham Minutes of Board of Directors' meeting, to secure the various Certificate of Tax Residency from the Malaysian Inland Revenue Board, we are of the considered view that there exist a real risk of dissipation of assets and destruction of evidence.

The revenue rule

[77] The respondents, in particular the 38th and 39th respondents contended that the appellant's present appeal/suit is essentially an action to recover the Danish Withholding Tax refunds that the appellant's claims were wrongly paid out. In other words, the Danish tax authority are seeking to claim or enforce its revenue, directly or indirectly, in Malaysia, enlisting the assistance of the courts here. As such it should not be allowed under the Revenue Rule.

[78] The House of Lords in *Government of India, Ministry of Finance (Revenue Division) v Taylor and Another* [1955] 1 All ER 292 at p 299, held that a court could not enforce the revenue laws of another country ('the Revenue Rule'):

> One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but *an extension of sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign,* is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand; in the case of *Moore v Mitchell* (1929) 30 F (2d) 600 604], in a passage, quoted also by Kingsmill Moore J in the case of *Peter Buchanan Ld* [[1955] AC 516: as follows:
>
> > While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign State, if they run counter to the 'settled public policy' of its own. Thus, a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or

even those who may be temporarily within its borders. *To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are entrusted to other authorities.* (Emphasis added.)

[79] On the exercise of sovereign authority, the English Court of Appeal in *Mbasogo and another v Logo Ltd and others* [2007] QB 846, [50] stated:

The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant *is not doing an act which is of a sovereign character* or by virtue of *sovereign authority* and the claim does not involve the exercise or assertion of a *sovereign right* and the claim *does not seek to vindicate a sovereign act* or acts, then the court will both determine and enforce it. (Emphasis added.)

[80] The question of whether a claim infringed the Revenue Rule is by determining the substance of the claim rather then its form. Based on the appellant's pleaded case and the evidence adduced, we are of the considered opinion that the claim filed is the appellant's attempt to seek redress and remedies under the laws recognised by Malaysia, in particular, the tort of deceit and/or fraudulent misrepresentation and not based on a debt accruing from taxes due and owing or tax evasion under the tax regime of the Kingdom of Denmark. Further the appellant's claim in the action in LHC does not arise from the tax regime of the Kingdom of Denmark, because the respondents never owned Danish shares and were therefore never within the Danish tax regime to begin with.

[81] Guidance can be found in the case of the United States District Court in New York in *In Re SKAT Tax Refund Scheme Litigation* 356 F Supp 3d 300 (SDNY 2019) when considering claims for the same nature brought by the appellant in the United States. The court stated at p 308:

If the plaintiff can prove that the defendants never in fact owned the relevant Danish stocks — and the Court is obliged to accept their a/legations as true for present purposes — *the revenue rule would not apply because the substance of the claims would be for garden variety commercial fraud.* (Emphasis added.)

[82] Further guidance can be found in the same case of the United States District Court in New York at p 311, where the court stated:

According to the complaints, the defendants defrauded SKAT by falsely representing that they owned shares in Danish corporations that paid dividends subject to a withholding tax which, if true, would have entitled the defendants to refunds under the US-Denmark Treaty. *These actions plainly do not seek direct*

A *enforcement of Danish tax law.* The defendants' attempt to frame them as seeking to recover lost tax revenue — when *the only reason the money was lost is because the defendants in effect allegedly stole* it, and *the only reason it supposedly concerns tax revenue is because the defendants' alleged victim was the Danish tax authority — is too clever by half.* (Emphasis added.)

B

[83] The United States District Court in New York *In Re SKAT Tax Refund Scheme Litigation* at p 318 of the report also held that:

C *The claims, as pleaded, are not ones for tax revenue but for money stolen from the plaintiff by fraud.* Any argument that an action is one for 'enforcement' if it involves the determination that defendants were not eligible for or entitled to tax refunds under Danish law is foreclosed by the case law discussed above. *Mere recognition or even application of foreign tax Jaw is not the same as enforcement.* (Emphasis added.)

D **[84]** We further find that the appellant's contention that the Labuan companies did not own shares in the Danish companies and were therefore never taxed by the appellant through the withholding tax regime was never rebutted by the Labuan companies which could have easily be done. Thus the Labuan companies therefore never came within the appellant's tax regime in
E the first place.

[85] The appellant's claim for the recovery of these monies/property is therefore no different from that which could be brought by any private individual or entity, being the victim of a fraud.

F

[86] In the light of the forgoing, we hold that the Revenue Rule has no application to the appellant's claim before this court.

G CONSIDERATION OF THE FOURTH SET OF APPEALS, NAMELY APPEALS NOS 1134–1137, ARE AGAINST THE SETTING ASIDE OF THE EX PARTE ORDER UPLIFTING LABUAN SECRECY

H CONSIDERATION OF THE FOURTH SET OF APPEALS, NAMELY APPEALS NOS 1134–1137, ARE AGAINST THE SETTING ASIDE OF THE EX PARTE ORDER UPLIFTING LABUAN SECRECY

The revelant law and principles

I **[87]** In respect of this set of appeal, it would be relevant first to note that the statutory provisions, both pursuant to s 149 of the Labuan Companies Act 1990 (Act 441) and s 178 of the Labuan Services and Securities Act 2010 (Act 704) protect the Labuan companies and Labuan trust companies from the disclosure of any documents, materials and information regarding its business

and affairs. However, the provisions are not exempted from the power and scrutiny of the courts.

[88] The first statutory provision above states as follows:

(1) No person who has by any means access to any record, book, register, correspondence, document, material or information relating to the business and affairs of the Labuan company or foreign Labuan company shall give, reveal, publish or otherwise disclose to any person such record, book, register, correspondence, document, material or information.

(2) All proceeding, other than criminal proceeding, relating to a Labuan company or foreign Labuan company shall be commenced in any Court, either under the provisions of this Act or for determining the rights or obligations of officers, members or debenture holders.

(3) Such proceeding and any appeal therefrom shall, unless the Court otherwise orders, be heard in camera and no details of the proceeding shall be published by any person without leave of the Court.

(4) *The provisions of subsection (1) shall not apply —*

(a) *when lawfully required to make such disclosure by any Court or under the provisions of any law being enforced by the Authority;*

(b) for the purpose of the performance of the Authority's supervisory functions as may be provided for under any written law;

(c) when lawfully required pursuant to section 22 of the Labuan Business Activity Tax Act 1990 [Act 445]; or

(d) when duly authorised by the Labuan company or the foreign Labuan company.

(5) A person who contravenes subsection (1) shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or one million ringgit or both.

(6) Nothing in this section shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the Court which is relevant to those proceedings. (Emphasis added.)

[89] While the second statutory provision above reads as follows:

(1) No person who for any reason has access to any record, book, register, correspondence or other document, material or information whatsoever relating to the affairs or accounts of the following persons, shall disclose to any other person, or make a record for any person of any such record, book, register, correspondence or other document, material or information —

(a) a mutual fund under Part III;

(b) any customer of a Labuan trust company or a Labuan private trust company under Part V;

A (c) any customer of a bank licensee under Part VI;

(d) any policy owner under Part VII;

(e) an exchange established under Part IX;

(f) a self-regulatory organisation established under Part X; and

B (g) any licensed entity under this Act.

(2) *Subsection (1) shall not apply to —*

(a) any disclosure lawfully required under section 28B of the Labuan Financial Services Authority Act 1996 or under section 22 of the Labuan C Business Activity Tax Act 1990;

(b) *any disclosure required under an order of the court made upon an ex-parte application, provided that the person disclosing the relevant information shall notify the person affected by the order and upon receipt of such notification, the affected person may file in the necessary application to the court to contest the* D *order or otherwise comply with the order accordingly;*

(c) *information relating to a mutual fund under Part III, with the prior consent of the mutual fund and its investors concerned;*

(d) *information relating to a customer of a Labuan trust company or a Labuan* E *private trust company under Part V, with the prior written consent of the customer;*

(e) *information relating to a customer of a bank licensee under Part VI, with the prior written consent of the customer or his personal representative;*

F (f) *information relating to a policy owner under Part VII, with the prior written consent of the policy owner or his personal representative or in the course of placement of reinsurance business;*

(g) *information relating to a licensed entity, with the prior written consent of the licensed entity.*

G (3) No person who has any record, book, register, correspondence or other document, material or information which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

(4) All proceedings, except criminal proceedings, relating to a contravention of this H section shall be commenced in any Court under the provisions of this Act and any appeal therefrom shall, unless the Court otherwise orders, be heard in camera and no details of the proceedings shall be published by any person without leave of the Court.

(5) Subject to subsection (6), nothing in this section shall limit any powers I conferred upon the Court or a judge thereof by the Bankers' Books (Evidence) Act 1949 or prohibit obedience to an order made under that Act.

(6) Section 7 of the Bankers' Books (Evidence) Act 1949 shall not apply to a bank licensee under Part VI, its directors or offers.

(7) Any person who contravenes subsection (1) commits an offence and shall, on

conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding three years or to both. (Emphasis added.)

[90] As seen above, both statutory provisions are not blanket provisions granting complete secrecy to the Labuan companies and Labuan trust companies. The courts are still able to curtail or totally remove such secrecy depending on justifiable reasons. To ignore the power of the courts as provided by the two statutory provisions should be an exercise in futility.

[91] There are justifiable and sufficient reasons in the present case to find that the secrecy afforded to both the Labuan companies and Labuan trust companies should not remain intact and should therefore be disturbed.

[92] These reasons include the fact the learned JC had already found that it was questionable that the Labuan companies actually owned and traded in the Danish corporations' shares. Her finding should be sufficient reason for the full documents, materials and information of the Labuan companies and Labuan trust companies to be made available to assist in determining whether the said shares were in fact in the hands of the Labuan companies.

[93] It is ironical for the Labuan companies and Labuan trust companies to vehemently protest against the lifting of the secrecy. The lifting of the secrecy would have greatly assisted them if indeed they had not acted fraudulently against the appellant.

[94] Such documents, materials and information should be made accessible to the appellant to prove that the Labuan companies and Labuan trust companies are above board in this respect and have nothing to hide. In that sense, it would be in their own interest for the Labuan companies and Labuan trust companies to reveal the documents, materials and information they have to allay the allegations and fears that they had acted fraudulently.

[95] The learned JC should not have set aside the ex parte order uplifting Labuan secrecy for the appellant having regard to the fact she had already found that there was extremely strong prima facie evidence that the activities of the Labuan companies were fraudulent since there was no proof that the same had traded in Danish corporations' shares and had gained dividends in these shares.

[96] The ex parte order uplifting Labuan secrecy granted by the learned JC should also be maintained because the above statutory provisions could not be used by the Labuan companies and Labuan trust companies to continue to protect its secrecy having regard to their respective roles in the strong possibility of fraud against the appellant.

[97] The learned JC also erred in treating this order akin to injunctive relief similar to the ex parte Mareva and Anton Piller orders. The grounds of setting aside the ex parte Mareva and Anton Piller orders should not have been used also to set aside the ex parte order uplifting Labuan secrecy. The learned JC should not have considered the element of material non-disclosure and ordered damages in respect of the ex parte order uplifting Labuan secrecy as no undertaking for damages was offered for it.

[98] In this regard, equating the considerations for uplifting Labuan secrecy similarly as considerations for refusing the inter partes Mareva and Anton Pillar orders could not be correct as the considerations for uplifting Labuan secrecy must also encompass the wider assessment whether any party would use the law to undermine the status of Labuan as a free trade zone.

[99] The appellant only need to show on the balance of probabilities by evidence, there are reasons to grant the ex parte order uplifting Labuan secrecy. The reasons are still true and should be a basis not to set aside that order.

[100] Premised on all the reasons aforesaid, the order uplifting Labuan secrecy should not have been disturbed. The learned JC with respect erred in setting aside that order. To assist the High Court in determining the truth of the appellant's allegation that the Labuan companies and Labuan trust companies had acted fraudulently, that order should remain inforce.

ORDER

[101] Premised on the reasons enumerated above, we are satisfied that there are merits in the following appeals and we make the following orders:

(a) in respect of Appeal 1130, we order for inter partes Mareva Injunction to be granted and the relevant respondents to affirm and file asset disclosure affidavits within 30 days from today;

(b) in respect of Appeals 1127–1129, 1131–1133 and 1139 where the order made by the learned JC, allowing The respondents' applications to set aside the ex parte Mareva order, we would restore the ex parte Mareva order;

(c) in respect of Appeals 1124–1126, 1168, 1618, 1620, 1623 and 1624 which are in respect of the respondents' applications to set aside the ex parte Anton Piller order, we would restore the ex parte AP order;

(d) in respect of the consequential order regarding the seized items in relation to this ex parte AP order, we order that the consequential order be set aside;

(e) in respect of Appeals 1134–1137, in respect of the order regarding the uplifting of the Labuan secrecy, we order that the order uplifting of the Labuan secrecy be restored; and

(f) the above appeals are hereby allowed with costs subject to payment of allocator fee. The decision of the learned JC dated 24 October 2019 is set aside.

Appeals allowed with costs.

Reported by K Selvaraju